No. 7681

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TOICHI TOMIKAWA,
Claimant and Appellant,
vs.
AMERICAN OIL SCREW "PATRICIA", No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,
UNITED STATES OF AMERICA,
Libelant and Appellee.

BRIEF OF APPELLEE

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Respondent,

UNITED STATES OF AMERICA,
Libelant and Appellee.

BRIEF OF APPELLEE

Replying to the lengthy and elaborate Brief of Appellant, it shall be our purpose to restrict ourselves to what we believe constitutes the main issue, to-wit: was the appellant entitled to the benefits of the convention between the United States and Japan, proclaimed January 16, 1928.

Statement of Facts

In approaching consideration of this question may we adopt appellant's statement of the nature of this appeal, set forth on page 3 and a portion of page 4? We believe it is necessary to add, however, the following facts:

The libel in question was filed April 28, 1932, following the seizure of the American Oil Screw "Patricia," No. 970-A, on March 23, 1932, by the Coast Guard, off the California Coast, more than an hour's sailing distance from land. The libel so filed proposed to libel the boat "Patricia," *her cargo,* (italics ours) engines, tackle, apparel, furniture, etc. (R. 5, 9.)

The monition was issued pursuant to the prayer of said libel on the 28th day of April, 1932, against the said American Oil Screw "Patricia," *her cargo* (italics ours), etc. Thereafter, to-wit: on the 28th day of April, 1932, return of the monition so issued as aforesaid was made except examination of that return indicates that the Marshal attached only the American Oil Screw "Patricia" and did not attach the *cargo* (italics ours). (R. 14.)

It further appears that on or about the 17th day of October, 1932, the answer of claimant herein to said libel was filed, said answer being duly verified (R. 15-22). (It will be observed from an examination of the opening paragraph, page 15, that no claim is advanced for the cargo.) Thereafter, to-wit: on or about the 29th day of March, 1933, libelant filed an amended libel of information (R. 25-29). Previous to this time, to-wit: on or about the 28th day of April, 1932, proclamation was read in open court (R. 31) by the United States Marshal, at which time the claimant and appellant herein appeared especially in open court and filed his petition to quash the seizure and process and proceedings based thereon. (R. 31-37.) In that petition (R. 34) it was alleged by claimant that he was the owner of the vessel "Patricia" with its engines, tackle, apparel and furniture.

(It will be observed that at no place in said petition was any claim made for the cargo.) After said petition had been filed at the same time and date, on motion of the United States Attorney default of all parties not appearing was entered. (R. 40.) Thereafter proceedings were had from time to time and motion to quash was denied following which claimant and appellant filed his answer as aforementioned. Subsequent thereto, to-wit: on or about the 29th day of June, 1933, the court entered its decree dismissing the said libel. Shortly thereafter, to-wit: on July 12, 1933, libelant filed a motion to vacate said decree of dismissal. The claimant and appellant on the 17th day of July, 1933, filed his answer to libelant's motion to vacate final decree and findings of fact and conclusions of law. Said motion was thereafter granted. On the 6th day of April, 1934, the Honorable District Judge made his order sustaining counts 2 and 3 of the amended libel and directed the entry of a decree in conformity therewith (R. 178, 180). Subsequent thereto, to-wit: on or about the 9th day of August, 1934, proposed Findings of Fact and Conclusions of Law and Decree were signed (R. 311, 321). It will be observed that the decree of forfeiture does not make any reference to the *cargo*. It is an appeal from this last mentioned decree of August 9, 1934, that appellant invoked the intercession of this court.

Questions of Law

As stated at the outset of this brief the principal question for decision is whether or not the claimant comes within the provisions of the convention between Japan and the United States heretofore alluded to.

I.

The Court Had the Power to Vacate Its Order and Decree of June 29, 1933.

For the sake of coherence we believe it will prove helpful to take up Point 12 of appellant's brief for first consideration.

Point 12 (appellant's brief, p. 62) challenges the power of the District Court to vacate the decree dismissing the libel dated June 29, 1933. In meeting the contention of the appellant it is but necessary to consider his own authority cited at page 62. At the bottom of that page appellant cites 1 *Corpus Juris,* 1339, Note 65, as his principal authority supporting his assertion "the granting of a new trial in admiralty is unknown." An examination of that citation leads to an inspection of footnote 64 which footnote in turn directs the briefer to Par. 286, on page 1342 of the same volume, wherein it is stated:

> "a court of admiralty has power on seasonable application therefor to reopen for a rehearing a decree entered under a misapprehension of the facts or on improper evidence."

It cannot be questioned that the motion to vacate was made seasonably for the record shows it was filed on July 12, 1933, which was thirteen days subsequent to the decree of dismissal (R. 173, 174). It is apparent therefore that in the citations under Point 12 of his brief appellant has failed to distinguish between a new trial

and motion to vacate decree of judgment. We accordingly submit that the order vacating said decree was proper on plaintiff's own authority.

1 *Cor. Jur.* 1339, 1342 as aforementioned.

II.

In an Action of Forfeiture in a Libel Such as is Here in Issue Probable Cause is Shown For Search. The Burden of Proving Their Exemption From the Forfeiture Sought Shifts From the Libelant to the Claimant.

The evidence is undisputed that when the boat "Patricia" was cited by the Coast Guard it was within four leagues of the coast (R. 771), had the number 970-A on its bow and on its stern the letters "L.A." in large capital letters, indicating "Los Angeles." It was likewise low in the water, indicating it was heavily laden. It was not flying the flag of any country. In the absence of a treaty to the contrary the Customs Laws permit the boarding of a vessel within four leagues of the coast to inspect its manifest. The testimony is clear and undisputed that after the Coast Guard cited the "Patricia" it came along side. Coast Guardsman Blondin went aboard the "Patricia." He was informed that they had no papers. Under the Customs Laws, the absence of papers plus the fact the boat being heavily laden in the water, amply warranted the subsequent search of the "Patricia" which revealed the contraband liquor. More than that, under the Customs Laws a failure to have a manifest

and papers is authorization for the Coast Guard to bring such vessel into port.

Sec. 581 *Tariff Act of 1930* (Title 19, *USCA* 1581) Re: Boarding;

Sec. 1615, Title 19, *USCA,* Re: Burden of Proof.

Probable cause having been shown for the search and seizure which preceded and is the basis for the instant libel, the burden of exempting the "Patricia" from the operation of the Customs Laws devolved upon the claimant, i.e., the burden of proving that to that end, the "Patricia" at the date of seizure came within the operation of the convention of 1928 between Japan and the United States.

Under Title 19, Sec. 1615, see Prima Facie case. *The Luminary,* 21 U. S. 407;

Probable Cause—"Present Circumstances Creating Suspicion," 267, 967; 256 F. 301.

III.

The American Oil Screw "Patricia" at the Date of Seizure Was Not Entitled to the Benefits of the Convention Between Japan and the United States as the Same Was Executed June 1928.

A. Because Not Flying Japanese Flag or a Boat For Which Japan Assumed Responsibility.

A. Appellant relies in great measure on the case of *Cook v. United States,* 288 U. S. 102, construing the treaty of May, 1924, with Great Britain. It is true that the treaty of the United States with Japan is very much like the above mentioned treaty with Great Britain. The

facts in this case differ. It should be particularly noted in this connection, Art. 11, Sec. 1 of said treaty, refers only to *private vessels unde rthe Japanese flag.* (46 *Stat.* 2446, 2449.) At no stage of this case has it ever been contended that the vessel "Patricia" was under the Japanese flag. (R. 123-125.) (R. 56.) Counsel for appellant has contented himself with an effort to convince this Honorable Court that because the owner of the ship was a Japanese, the nationality of the ship likewise was Japanese and therefore within the treaty. This is not sufficient. In support thereof we cite the following provisions of the law of Japan with reference to the right of a Japanese vessel to fly the Japanese flag. Under the Japanese law on said subject under date of December 22, 1930, the following appears:

"JAPAN

"(Translation.) December 22nd, 1930.

A. Granting of the Right to fly the National Flag.—Only Japanese vessels may fly the Japanese flag (Article 2 of the Shipping Law).

Japanese vessels may only fly the Japanese flag or navigate at sea after being provided with the nationality certificate or the provisional nationality certificate, without prejudice to special provisions of laws and decrees (Article 6 of the same law).

* * * * * * * *

(I) Nationality and Domicile of the Owner (Nationality and Registered Offices in the Case of Companies).—The following are recognized as Japanese vessels:

(1) Vessels belonging to Japanese governmental or official authorities;

(2) Vessels belonging to Japanese subjects;

(3) Vessels belonging to commercial companies having their registered offices in Japan, provided that all the partners in the case of general partnerships, all the partners whose responsibility is limited in the case of commandite companies and commandite joint-stock companies, and all the directors of joint-stock companies, are Japanese subjects;

(4) Vessels belonging to corporations having their registered offices in Japan, whose representatives are all Japanese subjects.

* * * * * * * *

(III) Registration and Tonnage Measurement.—The owner of the Japanese vessel must fix the home port in Japan and must apply to the competent maritime authorities having jurisdiction over that home port to measure the tonnage of the vessel.

Before a vessel acquired in a foreign country can navigate between foreign ports, the owner of the vessel may have the tonnage measured by the Japanese consul or commercial agent (Article 4 of the Shipping Law).

The owner of the Japanese vessel must, after having it entered, apply for its registration in the shipping register kept by the competent maritime authorities having jurisdiction over the home port.

When the registration referred to in the preceding paragraph has been effected, the competent maritime authorities shall issue the nationality certificate (Article 5 of the same law).

* * * * * * * *

B. Authorities at Home and Abroad Competent to issue Nationality Certificates: Conditions under

which the Issue is Effected.—The owner of a Japanese vessel must, after having the vessel entered, apply for its registration in the shipping register kept by the competent maritime authorities having jurisdiction over the home port.

When this registration has been effected, the competent maritime authorities must issue the nationality certificate (Article 5 of the Shipping Law).

* * * * * * * *

Persons who have acquired vessels abroad may ask for a provisional nationality certificate at the place of acquisition.

* * * * * * * *

C. Nature of the Nationality Certificates Issued by the Competent Shipping Authorities Abroad.—The period of validity of the provisional nationality certificate issued abroad may not exceed one year.

* * * * * * * *

(I) Fixing of the Vessel's Home Port.—The owner of a Japanese vessel must fix the home port in Japan and have the tonnage measured by the competent shipping authorities having jurisdiction over the home port (Article 4, paragraph 1, of the Shipping Law).

* * * * * * * *"

The above quotation is taken from a League of Nations document entitled "Comparative Study of National Laws Governing the Granting of the Right to Fly a Merchant Flag," dated April 20, 1931, giving a translation of the laws of Japan pertaining to the subject.

As we have earlier stated, the burden of proof falls upon the claimant in such a case as this once the Gov-

ernment has shown probable cause for the seizure. In the instant case the claimant has failed entirely to show that the vessel "Patricia" was entitled to fly the Japanese flag although owned by a Japanese citizen. Claimant has failed to show that the vessel ever obtained or even applied for a nationality certificate or the provisional nationality certificate made requisite by the laws of Japan to enable Japanese vessels to fly the Japanese flag. It necessarily follows therefrom and from the evidence before the Court herein that the "Patricia" in the instant case was not entitled to fly the Japanese flag, and consequently claimant cannot avail himself of the protection of the treaty with Japan of May 31, 1928.

This fact distinguishes clearly the instant case from that of *Cook v. United States*, 288 U. S. 102. In that case the motor screw "Mazel Rov" was alleged to be of British registry and owned by a Nova Scotian corporation. That is a different situation entirely from the facts in the instant case. Consequently the said case is not at all controlling here. On the other hand, as stated in Point 2, under the authority of United States law Section 581 of the *Tariff Act of 1930* (19 *United States Code*, Section 1581), the vessel in question was subject to being boarded by the United States Coast Guard, searched and seized, as was done in this case.

There should be no question of the duty of an alien living in the confines of a nation other than his own to observe the laws of the country in which he lives and of his being subject to their laws. In this connection may we respectfully quote to the Court the following authorities in support of said statement?

Wheaton, "Elements of International Law," Sec. 101, relative to the distinction between private and public vessels, reads as follows:

> "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects then, passing into foreign countries, are not employed by him nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

Moore's Interiational Law Digest, Volume 4, page 11:

> "Every foreigner born, residing in a country, owes to that country allegiance and obedience to its laws as long as he remains in it, as a duty imposed upon him by the mere fact of his residence, and the temporary protection which he enjoys and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states and nowhere a more established doctrine than in this country." (Mr. Webster, Secretary of State, Report to the President, December 23, 1931.)

Same volume, page 13:

"Every person who voluntarily brings himself within the jurisdiction of the country, whether permanently or temporarily, is subject to the operation of its laws, whether he be a citizen or a mere resident, so long as, in the case of the alien resident, no treaty stipulation or principle of international law is contravened." (Mr. Blaine, Secretary of State, to Mr. O'Connor, November 25, 1881.)

Hyde's "International Law Chiefly as Interpreted and Applied by the United States," page 465, Vol. I:

"His (the alien's) relation to the territorial sovereign as a resident within its domain does not appear to differ from that of the national; it is essentially domestic."

Borchard's "Diplomatic Protection of Citizens Abroad," page 349:

"The foreigner in entering a country tacitly undertakes to accept the laws and institutions which the inhabitants of the country find suitable to themselves. By becoming a resident, he undertakes the obligation of obedience to the laws, and assumes a certain relationship to the state of residence which has been popularly characterized as 'temporary allegiance.' "

Same volume, page 92:

"In international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as those possessed by and imposed upon the citizens of that country. * * * The domiciled

alien owes to the state of his residence practically all the duties of the native except such as have a political character; * * *."

Same volume, page 94:

"In return for the protection of person and property which, by municipal law and treaty, the country of residence assures to the alien, he owes obedience to the local law or what has been called temporary allegiance to the state."

Upon the foregoing authorities we respectfully contend that the facts in the instant case show clearly that the vessel was seized inside the twelve mile limit or four leagues from the coast.

An examination of an earlier treaty with Japan, of February 21, 1911, found in 37 *Stat.* 1504, gives added strength to the Government's contention that not only has the claimant failed to accept the burden of proof, bringing the "Patricia" within the terms of the convention of 1928, but that it affirmatively appears said "Patricia" was not within the terms of that convention.

This appears to be a "Treaty of Commerce and Navigation Between the United States and Japan." Article IV of said Treaty provides as follows:

"There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to

> foreign commerce, *subject always to the laws of the country to which they thus come.*" (Italics ours.)

On the question of the nationality of the vessel "Patricia," Article 7 of the Treaty of February 21, 1911, just cited, further shows the understanding between the United States and Japan as to what may be considered vessels of said countries. Said Article X is as follows:

> "Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan, respectively."

We desire to quote the pertinent provisions of Section 581 of the *Tariff Act of 1930,* referred to in Point 2 of this brief:

> "* * * at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle, is liable to forfeiture, it shall be the duty

> of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation." (Section 581 of the Tariff Act of 1930; Title 19 United States Code, Section 1581.)

This law of the United States clearly authorizes the seizure in the instant case.

We further point out that this is recognized by the United States Supreme Court in the *Cook* case in view of their statement, at page 120 in said case, referring to Section 581 of the *Tariff Act of 1930:*

> "The section continued to apply to the boarding, search and seizure of all vessels of all countries with which we had no relevant treaties. It continued also, in the enforcement of our customs laws not related to the prohibition of alcoholic liquors, to govern the boarding of vessels of those countries with which we had entered into treaties like that with Great Britain."

Clearly then the vessel "Patricia" not being within the provisions of the Treaty with Japan of May 31, 1928, because it did not fly the Japanese flag and was not entitled to do so, is subject to the laws of the United States and particularly the law just cited authorizing the seizure of the vessel within four leagues of the coast of the United States.

If the treaty of May 31, 1928, had used the terms "Japanese vessels" or "vessels owned by citizens of Japan" instead of the terms that it does use, i.e., "private vessels under the Japanese flag" there might be some merit to the contention of the claimant herein that he was

entitled to the benefits of said treaty, but it seems most apparent that the High Contracting Parties, in the said treaty, intended to and did, by said treaty, seek to protect and refer to only that type of private vessel that was "under the Japanese flag."

This construction of said treaty is made more apparent when we consider the other treaty between the United States and Japan, previously referred to as the treaty of February 21, 1911, wherein the High Contracting Parties specified, in Article X, what vessels were to be deemed to be vessels of the United States and of Japan, respectively, and stated in that regard that such vessels shall be understood to be—

> "Merchant vessels navigating under the flag of the United States or that of Japan *and carrying the papers required by their national laws to prove their nationality* * * *." (Italics ours.)

May we add one further observation? We respectfully point out to the Court that the territorial limits of three miles from the coast are not controlling in the instant case because of Section 581 of the *Tariff Act of 1930* (19 *U. S. Code*, Section 1581) authorizing the boarding, search and seizure of vessels outside the three mile limit and within four leagues of the coast.

The Supreme Court in the *Cook* case recognized that fact when it stated, on page 113, the following:

> "In the effort to prevent such violations British vessels were being boarded, searched and seized beyond the three-mile limit; and by Par. 581 of the Tariff Act of 1922 Congress undertook to sanction

> such action through enlarging the authority to board, search and seize beyond the three-mile limit so as to include foreign vessels although not inbound."

The recognition of this fact by the decision in the *Cook* case, coupled with their statement above quoted on page 120, that—

> "The section continued to apply to the boarding, search and seizure of all vessels of all countries with which we had no relevant treaties,"

clearly, in our opinion, disposes of the instant case as there is no relevant treaty of which the "Patricia" may avail itself since the said vessel does not come within the terms of the treaty of May 31, 1928 (46 *Stat.* 2446) as said treaty is limited, by its own terms, to "private vessels under the Japanese flag."

Furthermore, we feel we should again point out that the treaty in question goes no further than to state that—

> "The Japanese Government agree that they will raise no objection to the boarding * * * outside the limits of territorial waters by the authorities of the United States, * * *" (Section 1, Article II.)

The treaty further provides, in Section 2, of Article II:

> "If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions, for adjudication in accordance with such laws."

Section 3 of Article II provides in part:

> "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. * * *"

The terms of said treaty clearly comprehend the right given by the Japanese Government to the authorities of the United States to enforce its laws outside the territorial limits of the United States three miles as to "private vessels under the Japanese flag" and as to such by said treaty the Japanese Government agree that they will raise no objection.

We have here a situation where the "Patricia" is not such a vessel as is comprehended within the terms of said treaty nor do we have the slightest indication of objection to this seizure by the Japanese Government. This case has been so long pending and the matter has come to the knowledge of the Japanese authorities, as is evidenced by the appearance in this Court of the Japanese Consul, that if the Government of Japan was interested in the matter abundant opportunities have been presented them for any representation by said Government in this case. This we hold to be a further indication that the vessel "Patricia" is not within the terms of the treaty in question.

We wish further to point out in connection with our quotation above, from page 113, in the *Cook* case, the cases cited by the Supreme Court in Note 7 on said page concerning the boarding, searching and seizing of vessels beyond the three mile limit, and in particular refer to the

case of *The Island Home,* 13 F. (2d) 382, a decision of the Circuit Courts of Appeals for the Fifth Circuit, wherein the said Court clearly holds that the United States has jurisdiction over marginal sea to at least four leagues for the purpose of enforcing the revenue and customs laws and that a foreign ship, arriving within convenient distance from the coast so that cargo could be introduced by use of small boats, was held within the jurisdiction of the United States and required to observe all the customs laws and regulations and that under the Tariff Act of September 21, 1922, Section 581, the Coast Guard, observing a foreign ship at anchor had authority to board her for inquiry as to cargo and destination and finding no manifest, had the right to search without warrant.

Assuming, without admitting, that the vessel "Patricia" was a foreign ship, the boarding of her within the four league limit and failure of her master to produce a manifest, and the finding of the large cargo of intoxicating liquors aboard, would clearly seem, under the decision just mentioned and the other relevant decisions heretofore cited, to amply establish probable cause for the Coast Guard to seize the vessel. As we have previously stated, where probable cause is shown, the burden of proof under Section 615 of the *Tariff Act* (Title 19, *U. S. Code,* Section 1615) is placed upon the vessel or her claimant to show her innocence. We respectfully contend same has not been shown in this case.

B. It Affirmatively Appears That the "Patricia" Was Engaged in the Coasting Trade and Therefore Specifically Excluded From the Convention Between Japan and the United States, of 1928.

Article XIII of that convention, in part, provides:

> "the coasting trade of the High Contracting Parties is excepted from the provisions of the present treaty and shall be regulated according to the laws of the United States and Japan respectively * * *."

The evidence adduced overwhelmingly indicates that the "Patricia" was engaged in the coasting trade on the western coast of the United States. The claimant and appellant, Tomikawa, testified in substance that he purchased the "Patricia" at San Pedro and that he bought it for the purpose of capturing sardines; that he sent it to Ensenada and back to San Pedro and made a trip to San Diego to procure nets (R. 266). At the time the ship was hailed it had the name "Patricia" in its bow and its home port was designated by the word "Los Angeles" on its stern (R. 79). We have just quoted from the testimony of the witness Dwight, who was in charge of the Coast Guard which captured the "Patricia" the date she was apprehended.

Further, claimant and appellant herein testified that he had made his living fishing since coming to this country in 1919; that he had never done anything else; that he went to Japan for a short time in 1928, returning in 1929, and upon his return immediately reentered the fishing business for himself. He claimed it was the only business he had been in since that time. He further tes-

tified to tying up his ship for a few months because of orders from the cannery that they could not use any fish at that time. (R. 265, 266.)

The above excerpts from the testimony of the witness just quoted prove conclusively we respectfully submit that the boat "Patricia" was purchased for the fishing trade, was used in such trade and therefore came within the exceptions of Par. XIII hereinabove set forth.

We turn now to a consideration of the pertinent incidental questions raised by appellant. The designation "incidental" is applied because if this Honorable Court agrees with our contention that the "Patricia" was not within the convention between Japan and the United States, further consideration of other points urged becomes unnecessary. This by inference, is concurred in by claimant at page 4 of his brief.

We have already specifically denied the contentions of appellant's Points 1 to 6. Likewise we have covered appellant's Points 12 and 13.

Replying to Point 7 (Appellant's brief 52) that the libel did not affirmatively allege the boat was within one hour's sailing distance from the coast, we have merely to allege and prove the boat was within four leagues sailing distance of the coast, and that the burden of proof then shifted to the claimant.

Point 8. Answering Point 8 it is not our contention that the "Patricia" was a vessel of the United States, nor do we deny that she was an alien vessel within the meaning of the Customs Laws levying light money. What we do say is that the vessel "Patricia" was not within the terms of the convention between Japan and

the United States. That being so she was subject to being boarded within four leagues of the coast.

> "The section continues to apply to the boarding, search and seizure of all vessels of a country with which we had no relevant treaties."
>
> *Cook v. United States,* 288 U. S. at 120.

Points 9, 10, 11, and 13 have already been covered.

Points 14, 15, 16, 17 and 18 refer to the jurisdiction of the court over the cargo of liquor found on the "Patricia" at the time of seizure. At the time of the special appearance of the claimant at the time the proclamation was read, to-wit: on the 28th of April, 1932, he made no claim in that petition as to the ownership of the cargo (R. 31-37 at 34).

Furthermore, after the special appearance of the claimant had been entered on motion of the United States Attorney, default of all parties not appearing was entered (R. 40). Examination of the record indicates that the libel of information was against the ship, tackle (and cargo). However, the return of the monition on the 28th of April, 1932, showed that the Marshal only attached the "Patricia" (R. 14). We submit that from the foregoing statement in no event was claimant damaged by the order of court dismissing the libel, and the decree pursuant thereto which was signed on the 29th of June, 1933, and later vacated, which decree directed the return of the cargo to the claimant. This is true because either the court did not have jurisdiction of the cargo because it was not attached by the Marshal (and we so contend), or if the court did have jurisdiction, default of

said cargo was ordered at the time the proclamation was read following the appearance of the claimant, at which time he did not lay claim to the cargo.

Counsel has laid great stress on these points about the deprivation of his civil rights and his being misled to not laying claim for the cargo by virtue of the fact that it was named in the libel. We take issue with that assertion. An examination of claimant's Exhibit "A" (R. 258) indicates the reason for his failure to claim the cargo. (R. 259.) The court will take judicial notice of the fact that at the time claimant appeared in court he was under indictment, as set forth in Exhibit "A" just referred to, for violation of the National Prohibition Act and the Customs Laws, growing out of the presence of the cargo in question upon the "Patricia" the date of its seizure. It was only after that indictment was quashed, April 24, 1933, that claimant sought to lay claim to the cargo. These contentions are borne out by claimant's own testimony when he testified as late as August 7, 1934, that the cargo was not his; that it had been placed on his boat against his will by a ship which he said was in distress and whose Complement instructed him that they would be back for it the next night (R. 269, 271).

It is elementary that a court has no power over a person or thing which is never properly before it. We submit that since the Marshal did not attach the cargo, as shown by his return, that the cargo was never before the court. We further contend that the action of the Collector of Customs in proceeding against said cargo under the provision of Section 607 of the *Tariff Act of 1930*

was entirely proper and in accordance with law (See testimony of Deputy Collector, R. 228, 231).

It will be observed from an examination of the pages just referred to that this liquor was proceeded against as authorized by the Tariff laws during the month of August, 1932, which was *after* claimant had appeared in court on the day the proclamation was read, and at which time he made no claim for the cargo. It was also previous to the time that the order denying defendant's motion to quash the criminal charge was re-opened which was April, 1933.

With reference to appellant's Point 19, wherein it is claimed that the court in deciding this point should have taken judicial notice of the judgment quashing the indictment of the criminal action, an examination of claimant's Exhibit "A" for identification, previously referred to (R. 259) shows that the indictment was subsequently quashed after arguments and preliminary ruling dismissing the libel in this present proceeding, so that while it is elementary that disposition of a criminal charge will not dispose of civil matters such as forfeiture and/or taxes for violations of the Customs Laws, in addition it appears that the motion to quash was partially based on an order of the court which was thereafter set aside. The same argument applies to Point 20.

In reference to Point 21, wherein claimant objects to the introduction of evidence tending to prove that the vessel "Patricia" was subject to forfeiture for the additional reason that it was a Japanese owned boat in which there had been a break in the title, we respectfully submit that there is no irregularity in the taking of this

testimony because it is properly within the authority of the court after an order vacating decree has been entered. Nor is this evidence immaterial because the amended libel charges violation of the laws of the United States. (R. 25.) Claimant does not refute libelant's contention that the break in the chain of title as here disclosed subjects vessel to forfeiture.

Point 22 is based on the erroneous supposition that the cargo was being adjudicated by this proceeding. We have previously pointed out that either the cargo was never before the court by virtue of the Marshal not having attached it, or if it was before the court its default was entered at the time the proclamation was read and no motion to set aside such default was ever made.

May we not herein point out the exact statute under which the Collector of Customs was authorized to dispose of the cargo here in question, independent of court action?

The *Tariff Act of 1930*, and particularly these sections which may be herein designated as Sections 1605 and 1607 of Title 19, provide as follows:

> "1605. All vessels, vehicles, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the collector for the district in which the seizure was made to await disposition according to law."

Section 1607 provides:

> "If such value of such vessel, vehicle, merchandise, or baggage returned by the appraiser, does not

> exceed $1,000, the collector shall cause a notice of the seizure of such articles and the intention to forfeit and sell the same to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. For the purposes of this section and sections 1610 and 1612 of this chapter merchandise, the importation of which is prohibited, shall be held not to exceed $1,000 in value."

The court will take judicial notice of the fact that importation of the cargo of liquor in question was clearly prohibited under the laws of the United States which were then in force, to-wit: on March, 1932.

The testimony of Chief Deputy Collector of Customs Salter adduced that the cargo of liquor in question was disposed of under the provisions of the sections just quoted. (R. 235.)

Responding to Point 23 of appellant may we point out that it directly contradicts his Point 18. Point 18 he asserts because the libel included the cargo, the appellant relied thereon and gave up important legal rights. Thereby, he alleges, fraud was perpetrated on appellant. Point 23 claims that appellant was excused from filing a claim for the cargo because he was then under indictment and asserts that the answer was treated as a claim. By a statement in point 23 to the effect that appellant was excused from filing a claim because he was then under indictment appellant reveals that it was no error on his part which caused him to omit from his claim and motion to quash an allegation as to his alleged ownership of the cargo. From that statement in Point 23

it is likewise apparent that it was no error or misapprehension of the state of the record which caused claimant to fail to include the claim for the cargo in his answer. The court will note that that answer was filed on October 17, 1932 (R. 22), some seven months after the proclamation was read. It will be recalled we have previously pointed out no claim for the cargo was included at the time claimant made his special appearance, i.e., the date of the reading of the proclamation. It will likewise be recalled that the return on the monition dated April 28, 1932, showed that only the ship was attached. In view of the assertion here made in Point 23 appellant was excused from filing a claim because he was then under indictment can we not but conclude that claimant was conscious at all times hereinbefore referred to that he was not asking for an adjudication of any rights to the cargo.

Responding to Point 24 wherein claimant asserts that the finding to the effect that the cargo did not come within the jurisdiction of the court was erroneous we have but this observation. We have previously contended that it was through inadvertence the cargo was sought to be libeled in the libel of information. The finding in question was made in support of the record revealed by the return of the monition thus reconciling the libel of information with the return of the monition.

Responding to Point 25 we point out that there is no inconsistency as contended by claimant of the finding the cargo did not come within the jurisdiction as against the finding the lower court had jurisdiction of this proceeding. It is borne out by the fact that the return of the monition distinctly shows that the boat, tackle and equip-

ment which is herein adjudicated was attached by the Marshal whereas the cargo was not.

Before discussing Point 26 may we again re-emphasize the misapprehension under which claimant has proceeded throughout this brief in his assumption that it is the duty of the government and libelant to exclude the "Patricia" from the provisions of the convention between Japan and the United States. Whereas as a matter of law, when probable cause is shown, as alleged in the libel of information seeking the forfeiture, the burden then shifts to the claimant to excuse himself from the operations of the Customs Laws. We therefore take this opportunity of quoting portions of the leading cases on the point.

The *John Griffin*, 82 U. S. p. 29. This case is for decree of forfeiture against the bark *John Griffin* for the illegal smuggling of cigars into this country from Cuba. Decree of forfeiture was granted by the District Court which was reversed by the Circuit Court and the United States Supreme Court reversed the Circuit Court and affirmed the District Court. The two acts there in question were in substance as follows: The prohibition was against unloading merchandise which had come from a foreign port after nightfall. That statute after directing how seizure should be made provided "That in actions, suits, or informations to be brought where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the onus probandi shall be upon the claimant." That the libel was filed against the bark, claim was filed as owned by one Downey and others. Testimony showed that Downey

was Master and part owner of the vessel. The cigars were seized after they had been unloaded in New York and the owner of the cigars was the principal witness for the government. He testified that the cigars were imported on the bark with the knowledge, consent and connivance of Downey. A letter was found in the owners' room from Downey to him dated at the port from which the owners said they had embarked for the United States, acknowledging receipt of the owners' merchandise without naming its contents but indicating Downey's anxiety over the undisguised appearance of the cargo. The court said in part:

> "The case as thus made amounts to something more than the probable cause, which, by section seventy-one of the act of 1799, throws the onus probandi on the claimant of the vessel. It is a clear prima facie case, and both by the statutes and the ordinary rules of evidence required of the claimant such testimony as should satisfactorily rebut the presumption of guilt which it raised."

The court then proceeded with a discussion of the attack made upon the principal witness for the government, as it had been contrasted against the testimony of Downey and though the government's witness' testimony had been partially impeached the court pointed out that the letter from Downey to the witness was in harmony with the witness' story.

In *United States v. Three Thousand Eight Hundred and Eighty Boxes, etc.* 12 Fed. 402, this case revolved around a claimant's assertion to title to certain merchandise after seizure of opium which was seized from a row

boat which just left the ship. At page 405 the court undertakes a review of the controlling decisions respecting the burden of proof which is cast on a claimant responding to a libel of information seeking forfeiture. The court first undertook an analysis of Section 909 of the Revised Statutes of the United States. This statute provides:

> "In suits or informations brought when any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person the burden of proof shall be upon such claimant; provided, that probable cause is shown for such prosecution, to be judged of by the court."

It will be observed that this section is in substance the same as Section 1615 of Title 19, enacted June 17, 1930 (This section superseded Section 525 of Title 19, which had been enacted September 21, 1922). For the sake of analysis may we now quote Section 1615:

> "In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, That *probable cause* shall be first shown for the institution of such suit or action, to be judged by the court." (Italics ours).

Returning to the court's analysis in the case now cited (12 Fed. at 405) the court took occasion to quote in *Locke v. U. S.* 7 Cranch, 339, Marshall, C. J., observes:

> "It is contended that probable cause means prima facie evidence, or, in other words, such evidence, as in the absence of exculpatory proof, would justify condemnation. This argument is very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added that the term 'probable cause' according to its usual acceptation, means less than evidence which would justify condemnation, and in all cases of seizure has a fixed and well-known meaning. It implies a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

After commenting on the case of *John Griffin* which we have previously referred to the court then said:

> "There can, I think, be no doubt that a prima facie case for condemnation was made by the government, and that the onus probandi was thrown upon the claimant, and it became his duty 'to satisfactorily rebut the presumption of guilt which it raised.' This duty could only be discharged by the production of the best evidence of which the nature of the case admitted."

The court quoted from the case of *Clifton v. U. S.* 4 How. 247:

> " 'Under these circumstances the claimant was called upon by the strongest consideration, personal and legal, if innocent, to bring to the support of his

defence the very best evidence that was in his possession or under his control.' "

May we cite *Feathers of Wild Birds,* 267 Fed. 964 (footnote 3 Sec. 525 Title 19) wherein it is pointed out that probable cause as required by Section 1615, Title 19, under which this seizure was made is no more than present circumstances creating suspicion. Keeping in mind the fact that we have previously referred to the boat being heavily laden, no fishing nets visible, no flag, the name Los Angeles on its stern, proceeding in the direction of Los Angeles when cited, all of which were circumstances creating suspicion. We have taken this opportunity to further elaborate on the question of burden of proof because claimant's whole case is built up on the proposition that the government's evidence does not exclude the "Patricia" from the terms of the convention. Although we consistently contend that without it in any way being incumbent upon the government and libelant, the government's evidence does exclude the "Patricia" as has hereinbefore and will be hereafter more completely established.

We turn now to a consideration of Point 26 raised by appellant wherein he claims the finding that he was not entitled to fly the Japanese flag was without a scintilla of evidence. Counsel seems to have overlooked his stipulation and statement to the court wherein he stated in substance he would stipulate that this particular vessel was not registered, licensed or documented by the Japanese government. (R. 123).

May we again refer this court to the Japanese law under date of December 22, 1930, translation of which

is taken from the League of Nations documents dated April 20, 1931, entitled "Comparative Study of National Laws governing the Granting of the Right to fly a merchant flag." Following "A3 Granting of the Right to fly the National Flag—only Japanese vessels may fly the Japanese flag." (Art. 2 of the Shipping law) Japanese vessels may only fly the Japanese flag or navigate at sea after being provided with the nationality certificate or the provisional nationality certificate, without purejudice to special provisions of laws and decrees. (Article 6 of the same law).

Under C(1) of that document "Fixing the vessel's Home Port" the owner of a Japanese vessel must fix the home port in Japan and have the tonnage measured by the competent shipping authorities having jurisdiction over the same port (Article 4, paragraph 1, of the Shipping law.)"

Again at page 24 Mr. Schleimer admitted that outside of the registering of the vessel which was done at San Pedro by the Collector no other government or body had anything to do with numbering or enrolling or registering this particular vessel or libeling the same which admission was accepted by the court and counsel (R. 124, 125).

Furthermore, during the testimony of Kakichi Ozawa, (R. 126-132) he produced the official publication containing the registration of Japanese vessels, which publication revealed that the "Patricia" was not so registered. More particularly, in answer to re-cross examination by claimant's proctor the Vice Consul testified as follows:

> "This book contains all Japanese vessels registered in the Japanese ports regardless of the tonnage. You know, to be called Japanese ships, the ship must be registered at some Japanese port. A ship only owned by Japanese subjects does not mean Japanese vessels. This book does not contain vessels that are owned by Japanese in foreign countries. This book only contains vessels that have been registered, licensed and documented by the Government of Japan." (R. 149).

Any objection of the testimony and evidence just cited is overcome by claimant's own authorities page 94 of his brief, wherein he makes the statement the "flag" of a vessel and its "ownership" may be proved by parol or by any other competent evidence. Citations thereunder.

It should be borne in mind that evidence just cited was elicited by claimant's proctor in re-cross examination. That evidence, together with the stipulation of claimant's proctor hereinabove referred to and the shipping law above cited not only rebuts claimant's contention that there is not a scintilla of evidence to support the finding that the vessel "Patricia" was not entitled to fly the Japanese flag but rather overwhelmingly supports such finding.

Turning to Point 27 we must again remember that claimant is proceeding on the theory that the libelant instead of himself must prove that the "Patricia" is within the convention between Japan and the United States. Claimant asserts at Point 27 that the finding that appellant was not entitled to fly the Japanese flag is based on judicial knowledge because that was not pleaded or proved. We merely point out that certainly the libel-

ant did not plead that the appellant "Patricia" was not entitled to fly the Japanese flag because it is not a necessary allegation to a libel of information seeking forfeiture as we have previously pointed out.

The finding is made to that effect, despite the fact that it was not pleaded or proved, in order to show that the burden cast upon the defendant and which burden was set up by him in his affirmative defense to his answer had not been met.

Point 28 we have heretofore covered. The law of Japan together with the provisions of the treaty which lays down the requirements as to what shall be considered a Japanese vessel.

Point 29 restates claimant's earlier contention that the question whether or not the vessel "Patricia" was within the convention depends upon the owner's nationality irrespective of the flag she flies. We have seen from the testimony of the Vice Consul and an examination of the treaty that no such intention was expressed nor included in the terms of the treaty.

Point 30—responding to Point 30 wherein claimant and appellant states that the finding that the vessel was not registered in Japan did not affect her nationality because her nationality is nevertheless that of her owner, we have this reply. We are not here concerned with the nationality of the "Patricia." Our question is whether or not she was a private vessel within the meaning of the convention. We are not confronted with the question nor is this court called upon to decide what the nationality of the "Patricia" is. The question we contend is whether or not probable cause having been shown for

the seizure, has the claimant accepted the burden then thrust upon him in the law to establish the "Patricia" as being within the terms of the convention. In other words, has the claimant proven that the "Patricia" is a vessel entitled to fly the Japanese flag. To that end, has he proved that the "Patricia" has been registered or provisionally registered with the Japanese officials as required by Japanese law; has he shown that the claimant lists the "Patricia's" home port Japan? (The evidence shows from the Deputy Collector of Customs' testimony of the coast guard the vessel's home port is listed as Los Angeles on her stern, both of which points have been heretofore discussed.) Or has claimant even assuming but in no way admitting that he has assumed and sustained the burden that the "Patricia" is within the convention has the evidence not overwhelmingly shown that the "Patricia" was engaged in the coasting trade and therefore even if a Japanese vessel she is exempted from the convention by Article XIII of the convention which we have hereinbefore set forth and which is set forth at page 48 of claimant and appellant's brief.

Turning to Point 31 wherein claimant objects to the finding that appellant was domiciled in the United States and claims that there is not a scintilla of evidence to support such finding, we are constrained to point out claimant has not cited all of the testimony on that point. Claimant testified "I have been living at San Pedro, California, since May of 1919. Made my living since I came to the United States, fishing. I have been in the fishing business sometime for myself and sometime for others. I have been in the fishing business all my life.

Since I came to this country I do fishing and never do anything else." (R. 265).

Then follows a detailed description of the various boats owned partially or in their entirety by the claimant, all of which he testified were moored at San Pedro. He did testify that he left the country in December, 1928, but returned in May of 1929, when he again reentered the fishing business (R. 265).

Claimant testified that at all times he lived in the United States he lived at the same place, Terminal Island, at San Pedro. (R. 276). He further testified that he had been fishing more than fifteen years operating boats (R. 277). In response to a question he testified that he had not done any fishing when he lived in Japan because he was too young at that time; that he had only been in the fishing business since he had come to this country (R. 276).

We respectfully submit that no evidence could be more persuasive than the evidence just quoted to sustain the finding, it being based on claimant's own testimony he was domiciled in the United States. We again reiterate, however, that the question just discussed is immaterial to the issue whether or not probable cause having been shown for the forfeiture claimant assumed the burden of showing that the "Patricia" was not within the treaty between Japan and the Uinted States. We further point out that the treaty does not embrace vessels which are owned by subjects of Japan but those vessels which are entitled to fly the flag of Japan in which the Japanese government assumes responsibility. As we have seen again and again throughout this record the "Patricia" was not in that class.

Point 32. It is not contended that the finding that the appellant was domiciled in the United States affected his nationality. Nor we submit is this honorable court required under the issues to consider such a question.

Point 33. Turning to Point 33 wherein claimant asserts that libelant was estopped from disputing the nationality of the vessel because the Collector of Customs entered her as a foreign vessel. As we have pointed out before, it is only here contended that the claimant has not shown the "Patricia" was within the terms of the convention. But again, even assuming and in no way admitting it is the libelant's responsibility to exclude the "Patricia" from that convention, the registration by the Collector in no way affects the issue.

Claimant asserts, page 103 of his brief, that the undisputed evidence is to the effect that the Collector of Customs entered the vessel as a Japanese alien vessel. Before addressing ourselves to the argument may we point out in response to question as to what does the word "Jap" stand for, after the listing of the "Patricia" by name, together with its net tonnage—the Deputy Collector testified: "That means that is the nationality of the vessel *as we classify it.* I might add if it is an Austrian owned vessel, we class it as an Austrian vessel, Portuguese, Portuguese vessel." (R. 143). We immediately discern from the answer just quoted that the record is of no assistance with regard to the point here to be determined. The court is not asked to construe Customs law levying light money but rather to pass upon a decree of forfeiture on a boat which it has been found was within four leagues of the coast. There is no incon-

sistency in the fact that taxes are collected from an alien owned boat which makes its home port in America, and the interpretation of the treaty convention which exempts boats of a certain class, to-wit: private vessels which are enitled to fly the flag of Japan. As we have seen again and again, the "Patricia" was not entitled to fly the flag, because it is not registered as a Japanese boat by the Japanese authority, nor was its home port listed as Japan with the Japanese authorities or anyone else. Beyond all that it was engaged in the coasting trade and thus even if Japanese vessel in all other respects by virtue of its use is without the provisions of the treaty according to Article XIII.

Before leaving this point we wish to draw attention to the fact that claimant refers to findings and orders which were set aside by the order vacating a decree, and we respectfully submit such findings or such order is not before the court at this time inasmuch as claimant and appellant has appealed from the order vacating the decree.

Turning to Point 34 it is but a re-statement of Point 33. There is the same tendency to quote from findings and orders which have long since been vacated.

Turning to Point 35 wherein claimant asserts libelant was estopped from disputing the nationality of the vessel because of the judgment in the criminal action as we have previously pointed out claimant himself sets forth in two of his earlier points, 19 and 20, we have but to repeat the quashing of the indictment was made immediately subsequent to the order of the lower court in this action at the time it dismissed the libel, which order as

has been pointed out was vacated and thereafter the order and decree sustaining the libel entered.

It is from the last named decree that claimant is appealing.

Furthermore, answering Point 20, last paragraph, page 77, appellant and claimant's brief, wherein he states the judgment roll in the criminal action is merely offered in evidence of the fact in issue and not in bar to this proceeding. May we point out that the indictment in question was quashed long before the order setting aside the decree originally dismissing the libel. No motion was made upon the part of claimant and appellant to amend his answer.

Furthermore, since the indictment was quashed (after such motion had previously been denied) due to the fact that the lower court originally dismissed this libel, it is obvious that claimant was seeking to prove a fact the foundation of which had already been destroyed by the order vacating decree of dismissal of the libel in the instant action.

Referring to Point 36 wherein claimant states that the presence of the vessel within twelve miles of the coast did not justify her seizure because it was not a violation to there take bearings in a fog we have this observation to make. There is no merit in the point raised because an examination of Section 1581 of Title 19 immediately reveals that that section in authorizing the boarding of a ship within four leagues of the coast by Customs or Coast Guard is not confined to ships under way. To quote a brief portion of that section: "To examine the manifest and to inspect, search and examine the vessel or

vehicle and every part thereof and any person, trunk or baggage on board and to this end to hail and stop such vessel or vehicle which is *under way* and use all necessary force to compel compliance" * * *(Italics urse).

Referring to Point 37 wherein claimant contends that the possession of the cargo within 12 miles from the Coast did not justify the seizure because it was not engaging in trade, having transferred the cargo from a vessel in distress on the high seas, we make this observation. Claimant is assuming that the court accepted the testimony of the claimant. Claimant testified that his engines were not working well for that reason he had started back to San Pedro when he was already headed to San Diego (R. 267). Then he testified that after turning about, his engine stopped, while he was stopped the boat which he claims was in trouble, came alongside and forced him to take aboard this liquor (R. 270). He testified that this boat transferred this liquor two hours sailing distance before the coast guard seized him. (R. bottom 269). He then testified the boat which transferred the liquor told him to keep in the same place and he would be back that night and that he tried to keep in the same place. He did not run the engine, floated for a long time (R. 271).

In response to his counsel's question he testified that he did not come on back to where he was going, to-wit: San Pedro, because he was afraid of these people (R. 272). He testified on the occasion when he first came to the stand in May of 1932 as follows: "I did not have any financial interest in the 'Patricia'; not any. I work shares, after we get fish." (R. 62). When he was on

the stand August 7, 1934, on cross-examination in answer to the question "How much did he pay for the 'Patricia' he testified as follows: '$8,000.00.'" In answer to the question did he pay cash for that he answered "Yes sir" (R. 283). From the excerpts of the testimony of the claimant just quoted, we respectfully submit that the court below was amply justified in rejecting the testimony of the claimant regarding the presence of the liquor on his ship. The court on the other hand had the testimony of the coast guard officials as to the Patricia being well loaded, its failure to stop after being hailed until the Coast Guard drew alongside, the absence of any fishing nets on or about the boat, the same had the appearance of a fishing craft.

Point 38 wherein claimant contends that failure to produce a manifest is not a violation because demand was made beyond government's jurisdiction and the vessel was not bound to the United States, we have this observation to make. As we pointed out, from excerpts of claimant's testimony just quoted he was headed back to San Pedro. The Coast Guard officials stated that she was headed straight up the coast, northwest, when they came up behind her stern she had the letters "L. A." her home port and was headed in that direction. Counsel's citation, at page 111 of his brief, *in re United States v. 1,197 Sacks of Intoxicating Liquors,* 47 F. (2d) 284, refers to a boat which was in distress transferring a cargo to another ship. Claimant is again proceeding on the theory that the court accepted the evidence given by the claimant.

Point 39 claimant states that finding that the vessel was seized within four leagues from the Coast of the

United States is against Libelant's own evidence. Replying to that contention claimant confuses the testimony of the Coast Guardsmen as to his position when he first sighted the "Patricia" as compared with his position when he encountered the "Patricia." His testimony is as follows as to his position when he encountered the "Patricia." "I figured that I was 10 miles from San Juan point, 204 degrees true when I encountered the Patricia. I have a note of that here. * * * The nearest point of land is San Juan point." (R. 77).

Contradicting that testimony we have only the testimony of the claimant which we have had occasion to point out, the court was well justified in disregarding. Mathematical computation we find that computing a nautical mile at 6080 feet, ten such miles equal 60,800 feet. This latter figure when divided by 5280 feet (the number of feet in an English mile) equals 11.51 English miles. This clearly places the "Patricia" at the time of her encounter with the Coast Guard within the four leagues specified in Section 1581, Title 19, *USCA*.

Point 40 refers again to the power of the Collector of Customs to destroy the cargo. We have previously covered this point in our reply to points 22, 23, 24 and 25 claimant's brief.

Point 41 is merely a statement of elementary law, to-wit: a person is entitled to his property when unlawfully seized. It is here contended that there is no unlawful seizure and that is the point in issue.

Point 42 wherein the claimant asserts that in the event of a reversal the court should appoint a commissioner or Assessor to hear and report the damages sustained,

merely causes us to reassert that the treaty provides the respective High Contracting Parties shall each appoint a commissioner to adjust damages accruing from violation of such treaty.

Responding to Point 43, wherein claimant contends that the decree if sustained will subject the government to a refund of over fifty million dollars light money. We respectfully submit that claimant and appellant's apprehension and concern are unfounded. As we have previously pointed out the court is not here called upon to construe the Customs laws regarding the levying of duties and light money taxes. That comes within the power of Congress. What we are concerned with is whether or not the government having shown probable cause for the forfeiture herein sought, did the claimant accept the burden then imposed upon him by law and to that end brought himself within the treaty executed between Japan and the United States. A careful examination of those portions of the treaty cited by claimant himself indicates that the Contracting Parties to the convention between the countries did not understand themselves to be including all ships of both countries. As we have previously pointed out Article XIII recites that the coasting trade, is excepted from the Convention by the High Contracting parties.

We immediately conclude that there are or maybe those ships in the coasting trade on foreign shores of the Parties which might otherwise be in the treaty were it not for the exception. It is immediately apparent therefore that if this case is sustained it will in no way invoke the harsh burdens on the government predicted by

claimant's proctor. We have stated again and again and we repeat it is not contended that the "Patricia" is an American ship.

Point 44 refers to refusal to rule separately on appellant's request to find. We submit this is a moot point because it is covered by claimant's exceptions and objections to the findings and conclusions which were signed by this court from which signing and the decree based thereon he now appeals.

Passing to Point 46 wherein claimant raises a point regarding admiralty rule 1, we pass this without discussion because at page 127 of his brief claimant states this point is not involved in the instant case and we do not wish to burden the court unduly.

Conclusions.

It is respectfully submitted that the decree appealed from should be affirmed because the seizure in question was made within four leagues of the coast on probable cause, in that she was heavily laden, headed toward Los Angeles, Los Angeles was printed on her stern, there were no fishing nets discernible, and when hailed and boarded she had no manifest and that probable cause being shown not only did the claimant and appellant fail to assume and acquire the burden imposed upon him by law and to that end bring the "Patricia" within the terms of the convention between Japan and the United States, but if affirmatively appears notwithstanding his failure so to do that the "Patricia" was not within the class of vessels included in that convention.

We further submit that appellee should have the costs of appeal as herein incurred and such other and further relief as to the court may seem proper.

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BY J. J. IRWIN,
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Proctors for Appellee.